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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

A.J., Respondent, v. SEAN J., Appellant.	A154547 (Alameda County Super. Ct. No. HF15754815)

In 2015, respondent A.J. obtained a three-year domestic violence restraining order (DVRO) against her ex-husband, appellant Sean J.[1] A.J. later sought renewal of the DVRO, and following a hearing on her request, the trial court renewed the DVRO for another five years, finding that A.J. had demonstrated a reasonable apprehension of future abuse. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2015, A.J. filed a request for a DVRO against Sean, claiming he was an alcoholic who physically and verbally abused and threatened her and her four children. She contended that Sean forcefully grabbed and shoved her, was verbally abusive, and threatened to kill her and her sons when she confronted him about an extramarital affair.

[1] To protect the privacy interests of protected persons and other people involved, we refer to certain persons by their initials only. (Cal. Rules of Court, rule 8.90(b)(1).) We refer to other persons by their first names and last initials or first names only where the use of the person's full name would defeat the objective of anonymity for the protected persons. (*Id.*, rule 8.90(b)(11).) While this may present some difficulty to the reader, the privacy interests warrant this treatment.

On March 19, 2015, the trial court issued a DVRO against Sean prohibiting him from harassing, attacking, striking, threatening, assaulting, hitting, following, stalking, molesting, destroying the personal property of, disturbing the peace of, keeping under surveillance, blocking the movements of, contacting (directly or indirectly by any means), or coming within 100 yards of A.J. and her children, as well as their homes, vehicles, schools, and workplaces. The order was set to expire in three years on March 19, 2018.

On a date not readily ascertainable from the record on appeal, A.J. requested renewal of the DVRO.[2] On March 29, 2018, the trial court issued a pretrial order setting the hearing on A.J.'s request for May 16, 2018, before the Honorable Jason Clay in department 510. On April 19, 2018, Sean filed a peremptory challenge against Judge Clay. Judge Clay denied the motion, finding it was not timely filed within 10 days of either the notice of the assignment or Sean's appearance on March 26, 2018.

Pursuant to the pretrial order, Sean filed a list of witnesses and exhibits that he intended to present at the hearing. Of relevance to this appeal, Sean requested that his brother, K.J., be permitted to testify telephonically because he was living in another country. Sean also sought to introduce declarations from K.J. and several other individuals.

At the May 16, 2018, hearing, Sean's counsel indicated that K.J. was prepared to testify by phone, but the trial court responded, "This is an in-person hearing." The trial court reiterated that the hearing was "in-person" when A.J. indicated that she had brought witness statements.

A.J. testified over Sean's objection that her son J.C. disclosed that Sean had sexually abused, raped, and sodomized him for many years, beginning when he was five

[2] A request for renewal of a DVRO may be brought at any time within the three months before the DVRO expires. (Fam. Code, § 6345, subd. (a).) Sean does not contend A.J.'s renewal request was untimely, and even if he did, he does not demonstrate that he made such objection in the proceedings below. Thus, we will assume A.J.'s renewal request was timely made.

years old, and had threatened to kill J.C. if he told anyone. A.J. said she did not know about the sexual abuse at the time she initially filed for a DVRO in 2015. According to A.J., the sexual abuse case was being reviewed by the district attorney.

A.J. further testified over Sean's objection that on April 30, 2018, Sean violated a "temporary" restraining order that was then in place by going to the store where J.C. worked, staring at J.C., and continuing to linger around the store.[3] In overruling Sean's hearsay objection, the court stated it was admitting this testimony "for the purpose of explaining [A.J.'s] subsequent conduct." A.J. further testified that after the incident at J.C.'s workplace, she and J.C. went to the San Leandro Police Department and filed an incident report.

Sean called three witnesses: two of his siblings and an individual who had known Sean for several years. Each gave succinct testimony that Sean was not a violent person and had no sexual interest in males or minors.

At the conclusion of the hearing, the trial court found by a preponderance of the evidence that A.J. demonstrated a reasonable apprehension of future abuse. The court noted that it "considered the evidence and the findings on which the initial order was based as well as the current allegations of sexual abuse on [J.C.] that is [*sic*] currently being investigated by the District Attorney's Office." The court concluded that "without a valid restraining order in effect, it is reasonable for [A.J.] to fear future abuse from [Sean] based on the abusive acts that originally led to the initial restraining order, as well as a concern for retaliation by [Sean] against [A.J.] and her family as a result of bringing these allegations of sexual abuse to the attention of the District Attorney's Office." The trial court renewed the DVRO against Sean for five years until May 16, 2023.

Sean appealed.

[3] Although the record on appeal does not readily disclose that a temporary restraining order was in place on April 30, 2018, Sean does not dispute this testimony or point to any contrary evidence in the record.

DISCUSSION

Sean argues the trial court violated his right to due process and abused its discretion by relying on double hearsay evidence and refusing to accept his declarations and the telephonic testimony of his brother, K.J. Sean further argues the trial court failed to weigh the appropriate factors in determining the reasonableness of A.J.'s apprehension of fear. Finally, Sean contends the trial court erred in denying his disqualification motion.[4]

A. The DVPA and Standard of Review

Pursuant to the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.),[5] a court may issue an order to restrain any person for the purpose of preventing acts of domestic violence, abuse, and sexual abuse if the evidence before the court shows reasonable proof of a past act or acts of abuse. (§ 6300.) A DVRO "may be renewed, upon the request of a party, either for five years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party." (§ 6345, subd. (a).)

The test for renewing a DVRO is objective, and the court must find by a preponderance of the evidence that the protected party entertains a " 'reasonable apprehension' of future abuse." (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1290.) A reasonable apprehension of future abuse means the evidence demonstrates it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable. (*Ibid*.) An imminent and present danger of abuse is not required. (*Lister v. Bowen* (2013) 215 Cal.App.4th 319, 332 (*Lister*).)

"In evaluating whether the requesting party has a reasonable apprehension of future abuse, 'the existence of the initial order certainly is relevant and the underlying findings and facts supporting that order often will be enough in themselves to provide the

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[4] A.J. did not file a brief in response to this appeal.

[5] All further statutory references are to the Family Code unless otherwise noted.

necessary proof to satisfy that test.' [Citation.] 'Also potentially relevant are any significant changes in the circumstances surrounding the events justifying the initial protective order.' " (*Lister*, *supra*, 215 Cal.App.4th at p. 333.)

"We review the grant or denial of a request for a DVRO for abuse of discretion. [Citations.] We likewise review the trial court's failure to consider evidence in issuing a DVRO for an abuse of discretion. [Citation.] [¶] ' "To the extent that we are called upon to review the trial court's factual findings, we apply a substantial evidence standard of review." ' " (*In re Marriage of Davila & Mejia* (2018) 29 Cal.App.5th 220, 226.) Discretion is abused when the trial court's decision " 'exceeds the bounds of reason, all of the circumstances before it being considered.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

B. Evidentiary Rulings

1. *Double Hearsay*

The double hearsay that Sean claims the trial court improperly relied upon was A.J.'s testimony regarding the incident report filed with the police, which contained J.C.'s allegations of sexual abuse. Although we agree this testimony included extrajudicial statements, we conclude they were properly admitted for a nonhearsay purpose.

Hearsay is evidence of a statement made by a declarant outside of court and offered in court for its truth, and it is inadmissible except as provided by law. (Evid. Code, § 1200, subds. (a), (b).) When an extrajudicial statement is offered to prove the declarant's state of mind and action in conformity therewith, this constitutes a nonhearsay use. (*Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 947.) The statement is not offered to prove the truth of the matter asserted but to prove the declarant obtained certain information by hearing the statement and, believing such information to be true, acted in conformity with such belief. (*Ibid*.)

As the trial court expressly stated, A.J.'s testimony regarding the incident report and allegations made therein were not admitted for hearsay purposes but to explain her subsequent conduct. In finding that A.J. demonstrated a reasonable apprehension of

future abuse, the trial court focused on the sexual abuse allegations that were being investigated and the potential for retaliation by Sean against A.J. and her family for bringing these allegations to the attention of authorities. In other words, the extrajudicial statements were not admitted to prove Sean sexually abused J.C. but to establish that J.C.'s accusations against Sean were made to the declarant, A.J., and that she took action (i.e., reported the sexual abuse allegations to the police) in conformity with what she was told. Because this was not a hearsay purpose, the trial court did not abuse its discretion in admitting the testimony of the extrajudicial statements.

2. *Refusal to Allow Declarations and Telephonic Testimony*

Sean contends the trial court abused its discretion and violated his due process rights by refusing to allow his brother, K.J., to testify by telephone and by refusing to admit the written declarations of K.J. and two individuals, Cecilia C. and Jasmine C., which Sean intended to use to impeach A.J.'s credibility.

A trial court has broad discretion to control its proceedings in order to efficiently and effectively safeguard judicial economy and administer substantial justice. (*Little v. Pullman* (2013) 219 Cal.App.4th 558, 570; see Code Civ. Proc., § 128, subd. (a)(3).) It also has broad discretion in controlling the introduction and exclusion of evidence. (Evid. Code, §§ 320, 352, 765.) It is only when the court acts " 'in such manner as to prevent a full and fair opportunity to the parties to present all competent, relevant, and material evidence bearing upon any issue properly presented for determination' " that a litigant's due process rights are implicated. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357, italics omitted (*Elkins*), abrogated by statute on other grounds as stated in *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 838–840 (*Swain*).)

We conclude the trial court did not abuse its discretion or violate Sean's due process rights by refusing to accept the declarations and telephonic testimony. Notably, section 217 states in relevant part that in any hearing under the Family Code, absent a stipulation of the parties or a finding of good cause, "the court shall receive any live, competent testimony that is relevant and within the scope of the hearing." (§ 217, subd. (a).) Although section 217 "addresses the admissibility of live testimony, not the

inadmissibility of written testimony . . . , the issues are obviously related." (*Swain, supra*, 21 Cal.App.5th at p. 837, italics omitted.) "Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of the witnesses," while "written testimony is substantially less valuable for the purpose of evaluating credibility." (*Elkins*, *supra*, 41 Cal.4th at p. 1358.) Thus, even though telephonic testimony from K.J. would have allowed for cross-examination, it was not unreasonable for the trial court to conclude that live, in-person testimony was necessary to effectively evaluate the credibility of the witnesses in this DVPA hearing.

Sean does not contend the parties stipulated to declarations in lieu of live testimony. (§ 217.) In fact, the trial court stated at the hearing that it would consider Sean's declarations on the condition that the parties stipulated declarations could be admitted from both sides, but Sean did not accept the court's offer.

We further conclude that Sean fails to demonstrate the exclusion of this evidence prevented him from having a full and fair opportunity to present his case in violation of due process. There is no question Sean was given an opportunity to be heard, present witnesses, and cross-examine A.J. Sean cites (without analysis) the following factors set forth in *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1003–1004, to be considered in determining whether the exclusion of evidence violated due process: (1) the probative value of the excluded evidence on the central issue; (2) its reliability; (3) whether it is capable of evaluation by the trier of fact; (4) whether it is the sole evidence on the issue or merely cumulative; and (5) whether it constitutes a major part of the attempted defense. If anything, these factors appear to weigh *against* a finding of a due process violation and also show the harmlessness of the claimed errors.

Regarding the Cecilia C. and Jasmine C. declarations, Sean does not provide the substance of these declarations other than to assert that the declarants "accus[ed] [A.J.] of being a liar . . . ." Although A.J.'s credibility was a central and important issue in this hearing, the proffered declarations were simply not shown to be probative, reliable, or capable of evaluation by the trial court to impeach A.J.'s live testimony. Sean provides

no factual or procedural context for these declarations and does not explain how Cecilia C.'s and Jasmine C.'s mere *accusations* of dishonesty against A.J.—with no ability for A.J. to cross-examine the declarants or for the trial court to observe their demeanor—might have impeached A.J.'s testimony in any material respect.

As for K.J.'s proffered telephonic testimony or written declaration, Sean contends that because A.J. had been attempting to contact Sean through K.J. since 2014, this disproved her contention that she had a reasonable fear of Sean. But A.J.'s use of K.J. as a go-between, if found credible, could just as easily support an inference that she was too fearful to contact Sean directly. Sean provides no further explanation to show the probative value or importance of K.J.'s proffered evidence regarding his communications with A.J.

K.J. purportedly would have also testified or declared that Sean had no sexual interest in males or minors and was not a violent person. But this would have been cumulative to the testimony of Sean's in-person witnesses, and K.J. would not have even been present in the courtroom for the trial court to effectively evaluate his demeanor. Moreover, K.J.'s proffered evidence about Sean's lack of sexual interest in males or minors was not probative to the central issue in the case. As discussed, the trial court's ultimate ruling was not based on the truth of the allegation that Sean sexually abused J.C. but on A.J.'s reasonable fear that Sean would retaliate against her and her family for having reported the allegation to law enforcement.

For these reasons, we conclude Sean fails to show that the exclusion of evidence violated due process. For similar reasons, Sean fails to demonstrate the claimed errors resulted in prejudice—i.e., a reasonable probability that a result more favorable to him would have been reached had the declarations and telephonic testimony been allowed. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 348.) The trial court clearly found A.J. to be a credible live witness, and it is not reasonably probable that the mere accusations of dishonesty in the written declarations would have changed the court's assessment of A.J.'s credibility. (*Elkins, supra,* 41 Cal.4th at p. 1358 [written testimony substantially less valuable than live testimony for the purpose of

evaluating credibility].) It is also not reasonably probable that K.J.'s testimony would have resulted in a more favorable outcome for Sean given that he was unable to prevail based on substantially similar testimony from his live witnesses.

In sum, Sean's claims based on the disallowed written declarations and telephonic testimony are rejected.

C. Reasonable Apprehension of Future Abuse

Sean argues the trial court did not engage in the required process of weighing applicable factors to determine the reasonableness of A.J.'s apprehension of fear. We disagree and find substantial evidence supported the trial court's ruling.

In addition to the underlying findings and facts of the initial DVRO, which the trial court was permitted to consider on a renewal request (*Lister*, *supra*, 215 Cal.App.4th at p. 333), A.J. further testified she had reported Sean's sexual abuse of J.C. to the police; Sean had been interviewed by investigators; the sexual abuse case was being reviewed by the district attorney; and Sean violated the terms of a "temporary" restraining order by lingering at J.C.'s place of work after seeing that J.C. was there. Any violation of a restraining order gives significant support for renewal of a restraining order (*id*. at p. 335), and Sean's alleged violation of the temporary restraining order was made all the more serious by the ongoing sexual abuse case. We conclude A.J.'s testimony provided substantial evidence to support the trial court's finding that she had a genuine and reasonable apprehension of future abuse.

D. Peremptory Challenge

Sean argues the trial court erroneously denied his peremptory challenge as untimely. According to Sean, because the March 29, 2018, pretrial order did not state that Judge Clay was assigned to the case for all purposes, the deadline to file a peremptory challenge did not begin to run after issuance of this order.

Code of Civil Procedure section 170.6 permits a party to obtain the disqualification of a judge for prejudice, upon a sworn statement, without being required to establish it as a fact to the satisfaction of a judicial body. (*Zilog, Inc. v. Superior Court*

(2001) 86 Cal.App.4th 1309, 1315.) Where a disqualification motion is timely filed and in proper form, the trial court is bound to accept it without further inquiry. (*Ibid*.)

The rules for timely filing of a peremptory challenge are set forth in Code of Civil Procedure section 170.6, subdivision (a)(2). "As a general rule, a challenge of a judge is permitted under [Code of Civil Procedure] section 170.6 any time before the commencement of a trial or hearing. [Citations.] If the general rule applies, petitioner's challenge is timely. Subdivision (a)(2) of [Code of Civil Procedure] section 170.6, however, establishes three exceptions to the general rule, namely, the '10-day/5-day' rule, the 'master calendar' rule, and the 'all purpose assignment' rule." (*People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1171 (*Lavi*).) To determine whether a peremptory challenge has been timely filed, the trial court must decide whether the general rule or any of the three exceptions apply. (*Id.* at p. 1172.) If none of the exceptions applies, the general rule of Code of Civil Procedure section 170.6, that a challenge may be made any time before trial or hearing, applies. (*Id.* at p. 1185.)

The trial court concluded that Sean's challenge was untimely because it was not filed within 10 days after notice of the assignment to Judge Clay or Sean's appearance in the case.[6] It appears the trial court determined that the "all purpose assignment" rule applied to Sean's motion. Under this rule, "[i]f directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If directed to the trial of a civil cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 15 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 15 days after the appearance." (Code Civ. Proc., § 170.6, subd. (a)(2).)

[6] Sean's date of appearance is not readily ascertainable from the record, but he does not dispute the trial court's finding that his date of appearance was March 26, 2018.

"[F]or a case assignment to be an all purpose assignment, two prerequisites must be met. First, the method of assigning cases must 'instantly pinpoint' the judge whom the parties can expect to ultimately preside at trial. Second, that same judge must be expected to process the case 'in its totality' [citation], from the time of the assignment, thereby 'acquiring an expertise regarding the factual and legal issues involved, which will accelerate the legal process.' " (*Lavi*, *supra*, 4 Cal.4th at p. 1180, fns. omitted.)

We conclude Sean has failed to provide an adequate record showing error in the trial court's application of the all purpose assignment rule. Sean provides no argument or citation to evidence in the record demonstrating the court's method of assigning cases to departments for DVPA hearings. The only discernible evidence is the March 29, 2018, pretrial order, which set the matter for hearing within two months and (1) identified Judge Clay as presiding over the hearing; (2) indicated that the contested issues at the hearing were "request for Domestic Violence Protective Order"; (3) outlined the parties' "pretrial" obligations, "trial" procedures, and miscellaneous matters, including continuances; and (4) informed the parties that all communications with the court on matters relating to the hearing shall be with the department 510 clerk. Thus, the pretrial order pinpointed Judge Clay as the judge whom the parties could expect to ultimately preside at the hearing and process the DVRO renewal request in its totality. (*Lavi*, *supra*, 4 Cal.4th at p. 1180.) On this record, we cannot say the trial court erroneously denied Sean's peremptory challenge as untimely.[7]

DISPOSITION

The order renewing the DVRO is affirmed. A.J. shall recover her costs on appeal.

[7] We infer from the trial court's reference to a 10-day deadline that it found the instant matter to be a "criminal cause" within the meaning of Code of Civil Procedure section 170.6, subdivision (a)(2). However, a DVPA hearing is a civil proceeding. (See § 210 [rules of practice and procedure applicable to civil actions apply to proceedings under Family Code]; § 6220, amended by Stats. 2014, ch. 635, § 1 [Legislature's declaration regarding "civil protective orders"].) In any event, Sean did not file his peremptory challenge within 15 days of the all purpose assignment, as is required for civil causes. (Code Civ. Proc., § 170.6, subd. (a)(2).)

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Fujisaki, J.

We concur:

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Siggins, P.J.

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Wiseman, J.*

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.